Office-Supreme Court, U.S.
FILED
JAN 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY (formerly Fidelity and Columbia Trust Company), Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX A.

WALTER B. SMITH
Attorney for Petitioner
Address: 800 Columbia Building
Fourth and Main Streets
Louisville, Kentucky

January 15, 1965

APPENDIX A

Index

PAGE

Fourteenth Amendment to the Constitution of the United States, Section 1: 1

FEDERAL RULES OF CIVIL PROCEDURE
Rule 15.
AMENDED AND SUPPLEMENTAL PLEADINGS 2-3

Kentucky Revised Statutes Which Control The Final Settlements Of Accounts With Fiduciaries And Administrators Or Executors In Kentucky, Are Quoted Herewith From The Revised Statutes Of Kentucky 4-15

1. *The Statute KRS 25.170 (1062; 1065)* 3
2. *The Statute KS 3858 now KRS 25.175, in 1936* 4
3. *The Statute KS 1066; 1067 now KRS 25.190* 5
4. *The Statute KS 1067 now KRS 25.200* 6
5. *The Statute KS 403 now KRS 28.200* 7-8
6. *The Statute KS 186d-1; 3751 now KRS 62.060:* **BOND TO BE FOR FIXED SUM; MAY BE INCREASED; RELIEF FROM CERTAIN LIABILITIES** 8-9

SEC. 3751. COVENANT OF OFFICERS; CONDITIONS OF 10

KRS 62.060 (186d-1; 3751) was revised in June 19, 1946, and reads as follows: **BONDS OF OFFICERS, DEPOSITORIES AND FIDUCIARIES; FORM; CONDITIONS; AMOUNT; RENEWAL** 10

Index—Continued

PAGE

7. *The Statute KRS 62.070 (186-1; 3752)* **ACTION AND RECOVERY ON BOND** 11

3. *The Statute KRS 287.220 (598b-4; 611)* **CORPORATE FIDUCIARIES SUBJECT TO LAWS GOVERNING INDIVIDUALS** 11-12

9. *The Statute KRS 395.255* **NOTICE TO COMPEL FILING OF INVENTORY OR ACCOUNT; REMOVAL FOR DELINQUENCY; DISALLOWANCE OF COMPENSATION** 12

10. *The Statute KRS 395.310 (3859)* **INTEREST CHARGED REPRESENTATIVE ON ASSETS** 12

11. *The Statute KRS 396.140 (3877)* **OVERPAYMENT; RECOVERY OF** 12

12. *The Statute KRS 413.090 (2514)* **ACTION UPON JUDGMENT, WRITTEN CONTRACT OR BOND; FIFTEEN YEAR LIMITATION.**—Except as provided in *KRS 413.110, 413.200, 413.210, 413.220, 413.230 and 413.240* 13

13. *The Statute KRS 413.120 (2515; 2515)* **ACTIONS TO BE BROUGHT WITHIN FIVE YEARS** 14

14. *The Statute KRS 426.035 (C. C. 401)* **EXECUTION MAY ISSUE UNTIL BARRED BY LIMITATION** 14-15

15. *The Statute KRS 451.210 (992)* **RECORD OF FIDUCIARIES' SETTLEMENTS; FEES** 15

SMITH v. LOUISVILLE TRUST CO. (CITIZENS FIDELITY BANK & TRUST COMPANY)
212 S.W. 2d 987
Court of Appeals of Kentucky June 8, 1948
Rehearing Denied Oct. 29, 1948 15-26

Index—Continued

PAGE

Civil Code of Practice Sections
428 and 429 ..... 15, 16, 19, 20, 21, 22, 25

THE LOUISVILLE TRUST CO. ET AL. (CITIZENS FIDELITY BANK & TRUST COMPANY) v. SMITH, 313 Ky. 15, 230 S.W. (2d) 64
(May 16, 1950) 27-29

Civil Code of Practice Section 429 27-28

SMITH v. LOUISVILLE TRUST CO. ET AL. CITIZENS FIDELITY BANK & TRUST CO.
237 S.W. (2d) 836
Court of Appeals of Kentucky
(March 6, 1951) Rehearing Denied April 17, 1951 29-32

Civil Code of Practice Section 429 ..... 30, 31, 32

SMITH v. LOUISVILLE TRUST CO. et al. (CITIZENS FIDELITY BANK & TRUST COMPANY)
262 S.W. 2d 479
Court of Appeals of Kentucky Nov. 20, 1953 32-36

SCOTT'S HEIRS v. KENNEDY'S EX'R., etc.
12 B.M. 510; 51 Ky. 510-517, 4 KLR 712 (1849) 36-44

TURLEY'S ADMINISTRATOR v. BARNES, ETC.
103 Ky. 127; 44 S.W. 446; 19 Ky. Law Rep. (1808) 45-52

STANBERRY'S ADM'R v. ROBINSON, &c.
16 Ky. Law Report 309; 27 S.W. 973 (Filed October 18, 1894) 52-57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. .....

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY (formerly Fidelity and Columbia Trust Company), Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX A.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL RULES OF CIVIL PROCEDURE
Rule 15.
AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Supreme Court Constructions

City of Texarkana, Tex., v. Arkansas, Louisiana Gas Co., 59 S.Ct. 448, 306 U.S. 188, 620, 83 L.Ed. 598.

Tiller v. Atlantic Coast Line R. Co., 65 S.Ct. 421, 323 U.S. 574, 89 L.Ed. 465.

Hoiness v. U. S., 69 S.Ct. 70, 335 U.S. 297, 93 L.Ed. 16.

Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 72 S.Ct. 219, 342 U.S. 180, 96 L.Ed. 200.

Conley v. Gibson, 78 S.Ct. 99, 355 U.S. 41, 2 L.Ed. 2d 80.

Kentucky Revised Statutes Which Control The Final Settlements Of Accounts With Fiduciaries And Administrators Or Executors In Kentucky, Are Quoted Herewith From The Revised Statutes Of Kentucky.

1. *The Statute KRS 25.170 (1062; 1065) Provides:* "Settlements with fiduciaries; special commissioner; evidence.—The county judge shall make settlements with personal representatives, trustees, assignees, committees, curators and guardians in his county; or may, if he thinks proper, appoint a special commissioner to make such settlements; evidence may be heard for or against any item, and all oral evidence shall be reduced to writing by him, and no evidence shall be presumed to have been heard except such as is reduced to writing and reported. (1893, c. 221, p. 1030, Section 42.)

Section 1065. Biennial settlements with fiduciaries; notice; penalty.—He shall, when called on by a fiduciary,

settle his accounts, and shall once in each two years require all fiduciaries to settle their accounts, unless there is an action pending in the circuit court for such settlements; and any fiduciary failing without good cause therefor, when so notified to settle his accounts, shall be fined by the judge, for each day he so fails or refuses after notice, ten dollars, to be collected by rule or other process; notice of the time and place of settlement shall be given by the judge to all residents of the county interested in the settlement. (1893, c. 221, p. 1030, Section 45.)

This Statute was revised June 1, 1942, and reads as follows: Settlement with fiduciaries; special commissioner.—The county judge shall make settlements with personal representatives, trustees, assignees, committees, curators and guardians in his county, or appoint a special commissioner to make such settlements. (1942, c. 167, Sec. 24. Eff. June 1, 1942.)

2. *The Statute KS 3858 now KRS 25.175, in 1936 provided that: Section 3858.* Settlements, when to be made; duty of clerk.—Every personal representative shall have his accounts settled, and the settlements and vouchers sustaining the same returned to the county court within two years after he qualifies, and as often thereafter as the court may require, which settlement, when approved by the court, shall be recorded and indexed by the clerk, and the original and the vouchers carefully kept by him in his office. (1893, c. 156, p. 539, Sec. 22.)

In 1944, this Statute was revised and now states as follows: Fiduciaries' accounts; when required; proof of balances and securities.—One year after appointment and annually thereafter, unless otherwise provided by law, every fiduciary must render an account of the execution of his trust to the court by which he was appointed, including in such account an itemized statement of receipts and

disbursements supported by vouchers accompanying the same and a statement of all investments on hand and changes in investments since the filing of his last account. Provided, however, that guardians, committees and trustees under continuing trust, after their first accounting, shall render their accounts thereafter biennially, or at shorter intervals if the court shall require it. Such settlements, when approved and confirmed by the court, shall be recorded and indexed by the clerk, and the original and the vouchers carefully kept by him in his office. An account shall be rendered by the fiduciary at any other time upon order of the court upon its own motion or that of any person interested in the trust, for good cause shown on affidavit. At the expiration of his trust such fiduciary must fully account for and pay over the trust estate to the person or persons entitled thereto. Every such account shall list all unpaid creditors whose claims have been allowed and all creditors whose claims have been disallowed. No account of a fiduciary except of corporate fiduciaries under the supervision of State or Federal banking authorities shall be approved until there are exhibited to the court, for its examination, the security or securities shown in said account as being in the hands of the fiduciary, or the certificate of a bank having possession thereof or in which they have been deposited for safe-keeping, and a certified bank statement showing the funds to the credit of the trust. (1944, c. 173, Sec. 4. Eff. June 13, 1944. 1942, c. 167.)

3. *The Statute KS 1066; 1067 now KRS 25.190, provides: Sec. 1066.* "Settlement to be reported in writing; vouchers.—A report in writing of the settlement, showing each item of debit and credit, and the general result, shall be made by the judge or his commissioner, and returned, together with all evidence heard and vouchers filed, to the county court at its next regular term, and noted of record." (1893, c. 221, p. 1030, Sec. 46.)

Sec. 1067. "Settlements filed by clerk; exceptions; vouchers; new evidence.—The clerk shall endorse on the report the time of filing the same, and it shall lay over one term for exceptions, to be filed by any person interested. If no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded. If exceptions are taken, other evidence besides that reported may be heard, and the court shall, upon the whole case, reject, confirm, alter or amend the report, and if confirmed, order it to be recorded. The vouchers accompanying the report shall not be recorded, but must be carefully kept on file with the report in the clerk's office. Any new evidence given in court must be reduced to writing and filed with the report. Settlements so made and recorded shall be prima facie evidence between the parties interested." (1893, c. 221, p. 1030, Sec. 47.)

The Statute KRS 25.190 (1066; 1067) Provides: Report and filing of settlement.—The county judge or his commissioner shall make a written report of the settlement, showing each item of debit and credit, and the general result, and return it, with all evidence heard and vouchers filed, to the county court at its next regular term. The clerk shall note it of record, and endorse on it the time of filing.

4. *The Statute KS 1067 now KRS 25.200, provides:* "Settlements filed by clerk; exceptions; vouchers; new evidence.—The clerk shall endorse on the report the time of filing the same, and it shall lay over one term for exceptions, to be filed by any person interested. If no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded. If exceptions are taken, other evidence besides that reported may be heard, and the court shall, upon the whole case, reject, confirm, alter or amend the report, and if confirmed, order it to be recorded. The vouchers accompanying the report shall not

be recorded, but must be carefully kept on file with the report in the clerk's office. Any new evidence given in court must be reduced to writing and filed with the report. Settlements so made and recorded shall be prima facie evidence between the parties interested." (1893, c. 221, p. 1030, Sec. 47.)

This Statute 25.200 (1067) was revised June 1, 1942, and reads as follows: "Settlements filed by clerk; exceptions; vouchers, new evidence.—The clerk shall endorse on the report the time of filing the same and it shall lay over not less than ten days until the first day of the next term of court, to be known as the date of hearing, during which or at which, exceptions may be filed by any person interested. If no exceptions are filed the report, if made according to law, shall be approved and recorded. If exceptions are filed, other evidence besides that reported may be heard, and the court shall, upon the whole case, reject, confirm, alter or amend the report, and if confirmed, order it to be recorded. The vouchers accompanying the report shall not be recorded, but must be carefully kept on file with the report in the clerk's office. Any new evidence given in court must be reduced to writing and filed with the report. Settlements so made and recorded shall be prima facie evidence between the parties interested." (1942, c. 167, Sec. 13, Eff. June 1, 1942.)

5. *The Statute KS 403 now KRS 28.200 provides:* "Settlements with fiduciaries may be recorded; fees of clerks.—When the court may so direct, settlements of the accounts of personal representatives, trustees, guardians, or other fiduciaries, made before and reported by any commissioner, and all reports of estates or funds received or disbursed, under order of the court, by its commissioner or receiver, after the same shall have been confirmed by the court, shall be recorded by the clerk of such court in a book to be pro-

vided for that purpose. The vouchers accompanying such settlements or reports shall not be recorded. The clerk of such court shall be entitled to the same fees allowed by law to the clerks of the county courts for similar services. The commissioner or receiver of the court making such settlement or report shall allow, and state on the face thereof, the amount of fees that will be due to the clerk for recording." (1892, c. 31, p. 47, Sec. 15.)

This Statute 28.200 (403) was revised to read as follows: "Settlements with fiduciaries, recording of; clerk's fees.—When the court directs, settlements of the accounts of fiduciaries made before and reported by any commissioner, and all reports of estates or funds received or disbursed, under order of the court, by its commissioner or receiver, after they have been confirmed by the court, shall be recorded by the clerk of the court in a book to be provided for that purpose. The vouchers accompanying the settlements or reports shall not be recorded. The clerk shall be entitled to the same fees allowed to county clerks for similar services. The commissioner or receiver making the settlement or report shall allow, and state on the face thereof, the amount of fees that will be due to the clerk for recording."

6. *The Statute KS 186d-1; 3751 now KRS 62.060 provides:* **"BOND TO BE FOR FIXED SUM; MAY BE INCREASED; RELIEF FROM CERTAIN LIABILITIES.**—That the bond required by law to be executed and given by any state, county, city, school, or other public official, and the bond required by law of and depository of state, county, city, school or other public funds, and the bond of any executor, administrator, guardian, committee, assignee, or other fiduciary, and any other bond required by law for the discharge or performance of any public or fiducial office, trust, or employment, shall be a covenant to

the Commonwealth of Kentucky, from the principal and surety or sureties, that the principal will faithfully discharge the duties of the office, trust, or employment, and there shall be no other obligation in such bond; and such bonds shall be limited in a definite penal sum, which shall be determined and fixed by the officer or officers whose duty it is to approve the bond, and the recovery against the surety under any such bond shall be limited to the amount of the penalty named therein: Provided, that the bond of any executor, administrator, guardian, committee, assignee, or other fiduciary, shall be fixed in a penal sum of not less than the estimated value of the estate, and, provided, further, that the officer or officers taking any bond mentioned in this act, may at any time when it may appear to be to the interest of the obligee or obligees, increase the penal sum of such bond or require a renewal thereof with other or additional sureties, and, provided, further, that all state, county, city, school and other public officials and executors, administrators, guardians, committees, assignees and other fiduciaries, and other persons required by law to give bonds for the discharge or performance of any public or fiducial office, trust, or employment are hereby expressly relieved from all liability as insurers of funds which come into their hands, or subject to their control after same shall have been deposited in good faith in a bank or banks, a depository or depositories in the county approved by the fiscal court and 'the duties of the office, trust, or employment' shall not include any responsibility for loss of, or delay in payment of, funds deposited in any bank by reason of the failure or suspension of such bank or other depository and the obligors in such bonds are hereby expressly relieved of such responsibility, having complied with this statute." (1934, c. 22; 1910, c. 87, p. 263; 1908, c. 49, p. 125, Sec. 1. Eff. March 13, 1934.)

SEC. 3751. "COVENANT OF OFFICERS; CONDITIONS OF.—The obligation required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky from the person and his sureties that the principal shall faithfully discharge the duties of the office, trust or employment, but a bond or obligation taken in any other form shall be binding on the parties thereto according to its terms." (1893, c. 202, p. 912, Sec. 12.)

KRS 62.060 (186d-1; 3751) was revised in June 19, 1946, and reads as follows: **BONDS OF OFFICERS, DEPOSITORIES AND FIDUCIARIES; FORM; CONDITIONS; AMOUNT; RENEWAL.**—(1) The bond required by law to be executed and given by any public official, depository of public funds, or any fiduciary, and other bond required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky from the principal and surety or sureties that the principal will faithfully discharge his duties, and there shall be no other obligation in the bond. The bond shall be limited in a definite penal sum, which shall be determined and fixed by the officer or officers whose duty it is to approve the bond. The bond of each fiduciary shall be fixed in a penal sum of not less than the estimated value of the estate which the fiduciary is in charge of. The officer or officers taking any bond mentioned in this section may, at any time when it appears to be to the interest of the obligee, increase the penal sum of the bond or require a renewal thereof with other or additional sureties." (1946, c. 27, Sec. 6. Eff. 6-19-46.)

(2) "A bond or obligation taken in any form other than that required by subsection (1) shall be binding on the parties thereto according to its terms." (1946, c. 27, Sec. 6. Eff. 6-19-46.)

(3) "This section shall not apply to bonds given pursuant to KRS 62.160 to 62.200." (1946, c. 27, Sec. 6. Eff. June 19, 1946.)

7. *The Statute KRS 62.070 (186-1; 3752) provides:* "**ACTION AND RECOVERY ON BOND.**—Action may be brought from time to time on any bond required by law for the discharge or performance of any public or fiducial office, trust or employment, in the name of the Commonwealth, for its benefit or for that of any person injured by a breach of the covenant or condition, at the proper costs of the party suing, against the parties jointly or severally, together with the personal representatives, heirs and devisees or distributees of such of them as may be dead. Recovery against the surety shall be limited to the amount of the penalty fixed in the bond, but recovery against the principal shall not be limited by the amount of the penalty fixed in the bond. Recovery on the bond shall not be restricted to duties or responsibilities belonging to the office, trust or employment at the date the bond is executed, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

8. *The Statute KRS 287.220 (598b-4; 611) provides:* "**CORPORATE FIDUCIARIES SUBJECT TO LAWS GOVERNING INDIVIDUALS.**—(1) When acting as a fiduciary or in any other capacity in which the duties, powers, liabilities, rights and compensation are regulated by law, or under the control or supervision of the court, banks and trust companies shall, except as provided in subsection (2), be subject to the same duties and responsibilities, have the same rights and powers, and receive the same compensation as is allowed the individual holding or exercising similar offices or trusts."

(2) "Upon all bonds required to be executed by such corporation before any court, the capital stock shall be the

only security required for the faithful performance of its duties, unless the court or officer before whom the bond is executed, or some party in interest demands additional security."

9. *The Statute KRS 395.255 provides:* **"NOTICE TO COMPEL FILING OF INVENTORY OR ACCOUNT; REMOVAL FOR DELINQUENCY; DISALLOWANCE OF COMPENSATION.—**
If a fiduciary neglects or refuses to file an inventory or account when due according to law, or when ordered by the court, the court shall notify the fiduciary of his delinquency and fix a date when such inventory or account must be filed. Unless there is pending in the circuit court a suit to settle the estate such neglect or refusal shall be grounds for removal by the court. If the fiduciary fails to file such account within thirty days after the date fixed in said notice, no allowance shall be made for his services unless the court enters upon its minutes an order that such delay was justified." (1942, c. 167 Sec. 12. Eff. June 1, 1942.)

10. *The Statute KRS 395.310 (3859) provides:* **"INTEREST CHARGED REPRESENTATIVE ON ASSETS.—**
A personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets."

11. *The Statute KRS 396.140 (3877) provides:* **"OVERPAYMENT; RECOVERY OF.—**
When a personal representative pays to a creditor an undue proportion of his demand or to a distributee or devisee a part or all of his share of legacy, under a mistake as to the solvency of the estate or otherwise, he may recover

from the creditor, distributee or devisee the amount of the overpayment, with interest."

12. *The Statute KRS 413.090 (2514) provides:* **"ACTION UPON JUDGMENT, WRITTEN CONTRACT OR BOND; FIFTEEN YEAR LIMITATION.—** Except as provided in *KRS 413.110, 413.200, 413.210, 413.220, 413.230 and 413.240*, the following actions shall be commenced within fifteen years after the cause of action first accrued:

(1) An action upon a judgment or decree of any court of this state or of the United States, or of any state or territory thereof, the period to be computed from the date of the last execution thereon.

(2) An action upon a recognizance, bond or written contract.

(3) An action upon the official bond of a sheriff, marshal, clerk, constable or any other public officer, or any commissioner, receiver, curator, personal representative, guardian, committee, or trustee appointed by a court or authority of law.

(4) An action upon an appeal bond or bond given on a supersedeas, attachment, injunction, order of arrest or for the delivery of property or for the forthcoming of property, or to obey or perform an order or judgment of court in an action, or upon a bond for costs, or any other bond taken by a court or judge or by an officer pursuant to the directions of a court or judge, in an action or after judgment or decree, or upon a replevin, sale or delivery bond taken under execution, decree or warrant of distress, upon an indemnifying bond taken under a statute, or upon a bond to suspend a proceeding, or upon a bond or obligation for the payment of money or property or for the performance of any undertaking."

13. *The Statute KRS 413.120 (2515; 2518) provides:* **"ACTIONS TO BE BROUGHT WITHIN FIVE YEARS.—** The following actions shall be commenced within five years after the cause of action accrued:

(1) An action upon a contract not in writing, express or implied.

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

(3) An action for a penalty or forfeiture when no time is fixed by the statute prescribing it.

(4) An action for trespass on real or personal property.

(5) An action for the profits of or damages for withholding real or personal property.

(6) An action for the taking, detaining or injuring personal property, including an action for specific recovery.

(7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.

(8) An action upon a bill of exchange, check, draft or order, or any endorsement thereof, or upon a promissory note, placed upon the footing of a bill of exchange.

(9) An action to enforce the liability of a steamboat or other vessel.

(10) An action upon a merchants' account for goods sold and delivered, or any article charged in such store account.

(11) An action upon an account concerning the trade of merchandise, between merchant and merchant or their agents.

(12) An action for relief or damages on the ground of fraud or mistake.

(13) An action to enforce the liability of bail."

14. *The Statute KRS 426.035 (C. C. 401) provides:*

"EXECUTION MAY ISSUE UNTIL BARRED BY LIMITATION.—
An execution may be issued upon a judgment at any time until the collection of it is barred by the statute of limitation, although no execution may have been previously issued within a year and a day." (1952, c. 84, Sec. 1. Eff. 7-1-53.)

15. *The Statute KRS 451.210 (992) provides:* **"RECORD OF FIDUCIARIES' SETTLEMENTS; FEES.—**
The circuit clerk shall record in proper books the statements of all settlements made by fiduciaries in the court, and shall receive the same fees that county clerks receive for similar services, to be paid by the fiduciary and charged to the estate."

SMITH v. LOUISVILLE TRUST CO. Ky. 987

Cited as 212 S.W. 2d 987

SMITH v. LOUISVILLE TRUST CO.
(CITIZENS FIDELITY BANK & TRUST COMPANY)

Court of Appeals of Kentucky.
June 8, 1948.
Rehearing Denied Oct. 29, 1948.

Executors and administrators

Administrators' petition, not stating amounts of decedent's debts and nature or value of his property nor averring that personal estate was insufficient to pay all debts, alleging that there were sufficient assets to pay unpaid bequests in decedent's will, and not alleging that any one questioned beneficiaries' rights to such bequests, was insufficient to state cause of action for settlement of decedent's estate. Civil Code Prac. §§ 428, 429.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division; W. Scott Miller, Judge.

Action by the Louisville Trust Company and another (Citizens Fidelity Bank & Trust Co.), coadministrators with the will annexed of the estate of John A. O'Brien, de-

ceased, against Patricia R. Smith and others for settlement of the estate. Judgment for plaintiffs, and named defendant appeals.

Reversed.

Frank S. Ginocchio, of Lexington, Lawrence S. Grauman, of Louisville, and Walter B. Smith, of Shelbyville, for appellant.

Allen, McElwain, Dinning, Clarke & Ballantine and Davis, Boehl, Viser & Marcus, all of Louisville, for appellees.

VAN SANT, Commissioner.

The action was instituted by Louisville Trust Company and Citizens Fidelity Bank & Trust Company (formerly Fidelity & Columbia Trust Company), co-administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, against Patricia R. O'Brien (now Smith), and two beneficiaries of specific bequests who are not parties to this appeal because their bequests have been paid in full. The action was for a settlement of the estate of John A. O'Brien, and was instituted under purported authority of Section 428 of the Civil Code of Practice, which provides:

"1. Who may institute action. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate [provided that no such suit shall be brought by any of the parties named except the personal representative until the expiration of six months after the qualification of such representative].

"2. Who must be made parties. The representatives of the decedent, and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

In addition to averments in respect to corporate and representative authorities of the plaintiffs, and the corporate capacity of one of the beneficiaries of the will, the petition avers merely:

"Plaintiffs say that the defendant, College of Arts and Sciences of Georgetown University, of Washington, D. C., is a corporation organized and existing under the laws of the District of Columbia, with power to sue and be sued, contract and be contracted with, and with power to own and operate a university for the education of young men, and that said College of Arts and Sciences of Georgetown University, of Washington, D. C., was by Clause 2 of the will of the said John A. O'Brien bequeathed the sum of $1,000.00 in cash, to be expended by the Dean of said College for any purposes for which he may think suitable.

"Plaintiffs state that the defendant, The Most Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louisville, is the bishop of the Roman Catholic Church for the diocese of Louisville, and that the said John A. O'Brien at the time of his death was living in the diocese of Louisville of the Catholic Church, and by Item 2 of his will gave to said defendant the sum of $5,000.00, which should be expended for any purposes that said defendant may think is proper or desirable.

"Plaintiffs say that after their qualification as administrators, with the will annexed, of the said John A. O'Brien, they entered upon the performance of their duties as such, and took possession of all of the personal estate of the said

John A. O'Brien, deceased, and have continued to act as such administrators with the will annexed ever since; that they have caused all estate and inheritance taxes, except certain disputed and undetermined portions thereof, and all debts of said estate, to be paid, and have collected all income arising therefrom, and have kept an account of their receipts and disbursements and are now ready to make final settlement of the said estate; that they have not paid the bequests to either the College of Arts and Sciences of Georgetown University of Washington, or to the Roman Catholic Bishop of the Diocese of Louisville, but that there are sufficient assets to pay both of said bequests."

The prayer of the petition reads as follows:

"Wherefore, the premises considered, plaintiffs pray that their accounts as administrators, with the will annexed, of the estate of the said John A. O'Brien, be referred to the Commissioner of this Court for settlement, and for de-

termination of the amount to be paid to the beneficiaries under the will of John A. O'Brien, as hereinabove set forth; that an order be entered fixing and determining the compensation to be allowed the plaintiffs for their services as administrators with the will annexed of said estate, and that an order be entered fixing the compensation of their attorneys herein for their services in settling said estate, and that said estate be finally settled and distributed by order of this Court; for their costs herein and for all proper and equitable relief."

The principal asset of the estate of John A. O'Brien was a substantial interest in the partnership of E. J. O'Brien and Company, which was engaged in the business of

brokering and wholesaling loose-leaf tobacco. The partnership referred to did not terminate upon the death of either of the partners; and pursuant to the terms of the Articles of Partnership, the estate of John A. O'Brien was to continue as a partner until sold, or until the termination of the partnership should be made by agreed dissolution or incorporation. Approximately two years prior to the institution of this action, Mrs. Smith sold her interest in the partnership to the other members thereof, receiving for her share the sum of $380,000. Approximately eighteen months thereafter this suit was instituted by the Administrators; but previous thereto Mrs. Smith (then O'Brien) instituted a separate suit in the Jefferson Circuit Court against the partners of E. J. O'Brien and Company for the purpose of rescinding the sale of her interest in the partnership. After a hearing in the rescission suit, the lower Court dismissed her petition, which decision was affirmed by this Court, and certiorari denied by the Supreme Court of the United States. O'Brien v. O'Brien et al., 294 Ky. 793, 172 S.W.2d 595; Id., 321 U.S. 767, 64 S.Ct. 518, 88 L.Ed. 1063.

In the instant case Mrs. Smith filed a special and a general demurrer to the petition. The special demurrer was based on the allegation that the Court had no jurisdiction of the subject matter of the action. The general demurrer was based on the allegation that the petition does not state facts sufficient to constitute a cause of action against the defendant (appellant), or for the settlement of the estate of John A. O'Brien, deceased.

In referring to Section 428 of the Civil Code of Practice, supra, Section 429 of the Code provides:

"In such an action the petition must state the amount of the debts and the nature and value of the property, real and personal, of the decedent, so far as known to the plain-

tiff; and, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts."

It will be noted that the petition in this case does not follow the requirements of Section 429, supra, in that it does not state the amount of the debts, if any, the nature or value of the property, real or personal, of the decedent; neither does it aver that the personal estate is insufficient for the payment of all or any debts. The petition states that, by the terms of the will, certain bequests were made to the College of Arts and Sciences of Georgetown University of Washington, D. C., and to the Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louisville, which at the time of the institution of the action were unpaid; but the petition further alleges that there were at that time sufficient assets to pay both of the bequests; and no allegation was made in the petition that any one questioned the right of either of the beneficiaries to receive the bequests. The petition further alleged that the plaintiffs had caused all estate and inheritance taxes, "except certain disputed and undetermined portions thereof," and all debts of the estate to be paid, and that they had collected all income arising therefrom, and had kept an account of all receipts and disbursements, and that the plaintiffs at the time of the filing of the petition were ready to make final settlement of the estate.

It is obvious that the allegations of the petition fall

short of the requirements of an action to give a circuit court jurisdiction of a case for the settlement of an estate. It is equally obvious from the averments of the petition

that the estate had been settled, except the payment of the specific bequests to the College of Arts and Sciences of Georgetown University and the Bishop of the Roman Catholic Diocese of Louisville; and since no contention was made in respect to the payment of these bequests, the Administrators had only to file their settlement with the Judge of the Jefferson County Court. It is apparent that the Jefferson Circuit Court should have sustained the general demurrer to the petition, because it did not state a cause of action for the settlement of an estate.

The judgment is reversed.

SMITH v. LOUISVILLE TRUST CO. ET AL. (CITIZENS FIDELITY BANK & TRUST CO.)

June 8, 1948.

Rehearing denied October 29, 1948.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

W. Scott Miller, Judge.

Executors and Administrators.—Administrators' petition, not stating amount of decedent's debts and nature or value of his property nor averring that personal estate was insufficient to pay all debts, alleging that there were sufficient assets to pay unpaid bequests in decedent's will, and not alleging that any one questioned beneficiaries' rights to such bequests, was insufficient to state cause of action for settlement of decedent's estate. Civil Code of Practice, secs. 428, 429.

Frank S. Ginocchio, Lawrence S. Grauman and Walter B. Smith for appellant.

Allen, McElwain, Dinning, Clarke & Ballantine and Davis, Boehl, Viser & Marcus for appellees.

OPINION OF THE COURT BY VAN SANT, COMMISSIONER—Reversing.

The action was instituted by Louisville Trust Company and Citizens Fidelity Bank & Trust Company (formerly Fidelity & Columbia Trust Company), co-administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, against Patricia R. O'Brien (now Smith), and two beneficiaries of specific bequests who are not parties to this appeal because their bequests have been paid in full. The action was for a settlement of the estate of John A. O'Brien, and was instituted under purported authority of Section 428 of the Civil Code of Practice, which provides:

"1. Who may institute action. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate (provided that no such suit shall be brought by any of the parties named except the personal representative until the expiration of six months after the qualification of such representative.)

"2. Who must be made parties. The representatives of the decendent, and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

In addition to averments in respect to corporate and representative authorities of the plaintiffs, and the corporate capacity of one of the beneficiaries of the will, the petition avers merely:

"Plaintiffs say that the defendant, College of Arts and Sciences of Georgetown University, of Washington, D. C., is a corporation organized and existing under the laws of

the District of Columbia, with power to sue and be sued, contract and be contracted with, and with power to own and operate a university for the education of young men, and that said College of Arts and Sciences of Georgetown University, of Washington, D. C., was by Clause 2 of the will of the said John A. O'Brien bequeathed the sum of $1,000.00 in cash, to be expended by the Dean of said College for any purposes for which he may think suitable.

"Plaintiffs state that the defendant, The Most Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louisville, is the bishop of the Roman Catholic Church for the diocese of Louisville, and that the said John A. O'Brien at the time of his death was living in the diocese of Louisville of the Catholic Church, and by Item 2 of his will gave to said defendant the sum of $5,000.00, which should be expended for any purposes that said defendant may think is proper or desirable.

"Plaintiffs say that after their qualification as administrators, with the will annexed, of the said John A. O'Brien, they entered upon the performance of their duties as such, and took possession of all of the personal estate of the said John A. O'Brien, deceased, and have continued to act as such administrators with the will annexed ever since; that they have caused all estate and inheritance taxes, except certain disputed and undetermined portions thereof, and all debts of said estate, to be paid, and have collected all income arising therefrom, and have kept an account of their receipts and disbursements and are now ready to make final settlement of the said estate; that they have not paid the bequests to either the College of Arts and Sciences of Georgetown University of Washington, or to the Roman Catholic Bishop of the Diocese of Louisville, but that there are sufficient assets to pay both of said bequests."

The prayer of the petition reads as follows:

"Wherefore, the premises considered, plaintiffs pray that their accounts as administrators, with the will annexed, of the estate of the said John A. O'Brien, be referred to the Commissioner of this Court for settlement, and for determination of the amount to be paid to the beneficiaries under the will of John A. O'Brien, as hereinabove set forth; that an order be entered fixing and determining the compensation to be allowed the plaintiffs for their services as administrators with the will annexed of said estate, and that an order be entered fixing and determining the comattorneys herein for their services in settling said estate, and that said estate be finally settled and distributed by order of this Court; for their costs herein and for all proper and equitable relief."

The principal asset of the estate of John A. O'Brien

was a substantial interest in the partnership of E. J. O'Brien and Company, which was engaged in the business of brokering and wholesaling loose-leaf tobacco. The partnership referred to did not terminate upon the death of either of the partners; and pursuant to the terms of the Articles of Partnership, the estate of John A. O'Brien was to continue as a partner until sold, or until the termination of the partnership should be made by agreed dissolution or incorporation. Approximately two years prior to the institution of this action, Mrs. Smith sold her interest in the partnership to the other members thereof, receiving for her share the sum of $380,000. Approximately eighteen months thereafter this suit was instituted by the Administrators; but previous thereto Mrs. Smith (then O'Brien) instituted a separate suit in the Jefferson Circuit Court against the partners of E. J. O'Brien and Company for the purpose of rescinding the sale of her interest in the partnership. After a hearing in the rescission suit, the lower Court

dismissed her petition, which decision was affirmed by this Court, and certiorari denied by the Supreme Court of the United States. O'Brien v. O'Brien et al., 294 Ky. 793, 172 S. W. 2d 595; Id., 321 U. S. 767, 64 S. Ct. 518, 88 L. Ed. 1063.

In the instant case Mrs. Smith filed a special and a general demurrer to the petition. The special demurrer was based on the allegation that the Court had no jurisdiction of the subject matter of the action. The general demurrer was based on the allegation that the petition does not state facts sufficient to constitute a cause of action against the defendant (appellant), or for the settlement of the estate of John A. O'Brien, deceased.

In referring to Section 428 of the Civil Code of Practice, supra, Section 429 of the Code provides:

"In such an action the petition must state the amount of the debts and the nature and value of the property, real and personal, of the decedent, so far as known to the plaintiff; and, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts."

It will be noted that the petition in this case does

not follow the requirements of Section 429, supra, in that it does not state the amount of the debts, if any, the nature or value of the property, real or personal, of the decedent; neither does it aver that the personal estate is insufficient for the payment of all or any debts. The petition states that, by the terms of the will, certain bequests were made to the College of Arts and Sciences of Georgetown University of Washington, D. C., and to the Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louis-

ville, which at the time of the institution of the action were unpaid; but the petition further alleges that there were at that time sufficient assets to pay both of the bequests; and no allegation was made in the petition that any one questioned the right of either of the beneficiaries to receive the bequests. The petition further alleged that the plaintiffs had caused all estate and inheritance taxes, "except certain disputed and undetermined portions thereof," and all debts of the estate to be paid, and that they had collected all income arising therefrom, and had kept an account of all receipts and disbursements, and that the plaintiffs at the time of the filing of the petition were ready to make final settlement of the estate.

It is obvious that the allegations of the petition fall short of the requirements of an action to give a circuit court jurisdiction of a case for the settlement of an estate. It is equally obvious from the averments of the petition that the estate had been settled, except the payment of the specific bequests to the College of Arts and Sciences of Georgetown University and the Bishop of the Roman Catholic Diocese of Louisville; and since no contention was made in respect to the payment of these bequests, the Administrators had only to file their settlement with the Judge of the Jefferson County Court. It is apparent that the Jefferson Circuit Court should have sustained the general demurrer to the petition, because it did not state a cause of action for the settlement of an estate.

The judgment is reversed.

LOUISVILLE TRUST CO. ET AL. (CITIZENS FIDELITY BANK & TRUST COMPANY) v. SMITH.

May 16, 1950.

Scott Miller, Judge

Action by Louisville Trust Company and another (Citizens Fidelity Bank & Trust Company), coadministrators, with will annexed of the estate of John A. O'Brien, deceased, against Patricia R. (O'Brien) Smith and others, for settlement of the estate. The Circuit Court, Chancery Branch, Second Division, Jefferson County, Scott Miller, J., rendered judgment for defendants, and plaintiffs appealed. The Court of Appeals, Morris, C., held that petition was insufficient.

Affirmed.

1. Pleading.—The legal sufficiency of a pleading may be tested by an objection to the filing thereof; the objection being treated as a general demurrer thereto.

2. Executors and Administrators.—Amended petition which did not contain averments required by statute though stating that administrators tendered to interested parties a proposed settlement of the estate which they intended to make, and objections were registered was insufficient to state cause of action for settlement of decedent's estate. Civil Code of Practice, sec. 429.

3. Executors and Administrators.—One of the purposes of settlement of estate in county court is to give parties interested opportunity to file objections reasonably and properly.

Allen, McElwain, Dinning, Clark & Ballantine and Davis, Boehl, Viser & Marcus for appellants.

Walter B. Smith for appellee.

Morris, Commissioner—Affirming.

In Smith v. Louisville Trust Co. et al., 308 Ky. 189, 213 S. W. 2d 987, we held that the original petition did not state a cause of action for the settlement of the estate involved, in that it did not contain the averments prescribed in Section 429 of the Civil Code of Practice.

Upon return of the case to the Circuit Court, appellants filed motion for permission to file an amended petition. Objection was entered thereto and the court denied the motion, but permitted the tendered petition to be made a part of the record.

Appellants argue that the chancellor interpreted the mandate and opinion of the court in this second appeal, as precluding any further pleadings in the action, and that the question, as to whether the allegations of the amended petition were sufficient to state a cause of action, was never reached.

We deem it unnecessary to go into the niceties of the difference between the overruling of a motion to file an amended petition, to which there is objection, and the sustaining of a demurrer to that petition after filed, because here this tendered amended petition did not state a cause of action. The result is the same as if it had been filed and demurrer sustained thereto. In Shuey v. Hoffman, 224 Ky. 765, 7 S. W. 2d 202, 203, we said: "The legal sufficiency of a pleading may be tested by an objection to the filing thereof; the objection being treated as a general demurrer thereto." See also the cases cited therein.

We have carefully considered the tendered amendment and find that it contains nothing additional which would justifiably bring it within the provisions of the Code. There does seem to be an attempt to set up the existence of a controversy between the parties, in that appellants had tendered to appellee a proposed settlement of the estate which

they intended to make, to which she registered some objections. We only ask, where would we be going, if, in the settlement of estates properly to be made in the county court, we should follow a rule for administrators to submit a proposed settlement to those interested, and merely because of disapproval thereof, permit action to be brought in circuit court. It is the duty of the administrator to settle. One of the purposes of settlement in the county court is to give the parties interested an opportunity to file objections seasonably and properly. There is no reason why an exception should prevail in Jefferson County. This matter has been unreasonably prolonged. The settlement should be made as per the opinion in the former appeal.

The judgment is affirmed.

SMITH v. LOUISVILLE TRUST CO. ET AL. CITIZENS FIDELITY BANK & TRUST CO.

Court of Appeals of Kentucky.

March 6, 1951.

Rehearing Denied April 17, 1951.

Suit by Patricia R. Smith to enjoin the Louisville Trust Company, and others (Citizens Fidelity Bank & Trust Company), coadministrators of John A. O'Brien, deceased, from further prosecuting a second so-called settlement suit in the Jefferson Circuit Court. The Circuit Court, Chancery Branch, Second Division, Jefferson County, W. Scott Miller, J., dismissed plaintiff's petition and overruled her motion for reconsideration of the petition, and plaintiff appealed. The Court of Appeals, Van Sant, C., held that the matter had been unreasonably prolonged and that since two former opinions of the Court of Appeals had directed the coadministrators to make final settlement in the County

Court, the court below should have permanently enjoined the further prosecution of the second settlement suit.

Reversed with directions.

1. Executors and administrators

Basic requirement for settlement suit is that there be not sufficient personal estate for payment of debts, and mere fact that there are some disputed matters and possibly questions that should be litigated is not qualification for settlement suit in circuit court. Civ. Code Prac. § 429.

2. Injunction

Where second settlement suit was filed by coadministrators while second appeal of first settlement suit was pending, and where it appeared that amended petition filed in first suit after first appeal had been subject to same defects as original pleading, coadministrators should have been permanently enjoined from further prosecution of second settlement suit, in view of fact that two former opinions of Court of Appeals had directed coadministrators to make final settlement in County Court. Civ. Code Prac. § 429.

Walter B. Smith, Louisville, for appellant.

R. Lee Blackwell, Wm. Marshall Bullitt, Bullitt, Dawson & Tarrant, Irvin Marcus and Davis, Boehl, Viser & Marcus, all of Louisville, for appellee.

VAN SANT, Commissioner.

Appellant sought by her petition and motion permanently to enjoin appellees from further prosecuting a second so-called settlement suit in the Jefferson Circuit Court. The court dismissed plaintiff's petition. Plaintiff then filed motion for reconsideration of her petition. The court over-

ruled this motion and granted plaintiff an appeal to this court.

Appellees, co-administrators with the will annexed of John A. O'Brien, deceased, had instituted their first action in the Jefferson Circuit Court for a settlement of the estate of John A. O'Brien. Upon appeal to this court it was held that the petition did not state a cause of action for the settlement of the estate in that it did not contain the averments prescribed in Section 429 of the Civil Code of Practice. Smith v. Louisville Trust Co., 308 Ky. 189, 213 S.W. 2d 987.

Upon return of the above case to the circuit court, the co-administrators tendered an amended petition. Objection being entered thereto the court refused permission to file same but permitted the tendered amendment to be made a part of the record. The co-administrators then appealed to this court.

Soon thereafter and while this second appeal was pending, this second action was filed in the Jefferson Circuit Court seeking a settlement of the estate of John A. O'Brien, deceased. In the second appeal above the judgment was afterwards affirmed. Louisville Trust Co. v. Smith, 313 Ky. 15, 230 S.W.2d 64.

[1] It appears to be the position of the co-administrators that as long as there remain disputed questions they are entitled to bring action in the circuit court for the settlement of the estate. The mere fact that there are disputed matters and possibly questions that should be litigated, is not qualification for a settlement suit in the circuit court. One of the basic requirements for such suit is that there be not sufficient personal estate for payment of the debts.

It will be noted that this second attempted settlement suit was filed while the second action above was in the

process of appeal. The averments of the first action failed to meet the requirements of 429 of Civil Code of Practice. The tendered amendment, which was the subject of the second appeal, also failed in this respect. There could be no possible end to litigation should a party be permitted to file a series of attempted settlement suits.

Since this matter has been before us, another case has come and gone which had to do with the filing of a settlement of this estate in the county court, in which appellees claimed to have made a purported final settlement, subject to a few questions yet to be determined. Again we say this matter has been unreasonably prolonged.

The way has been opened and is now open for the final settlement in county court. Under two former opinions of this court appellees have been directed to make final settlement in the county court. Further unnecessary delay will be inexcusable.

[2] The court below should have permanently enjoined the further prosecution of this second settlement suit.

The judgment is reversed for entry of judgment consistent herewith.

SMITH v. LOUISVILLE TRUST CO. Ky. 479

Cite as 262 S.W.2d 479

SMITH v. LOUISVILLE TRUST CO. et al. (CITIZENS FIDELITY BANK & TRUST COMPANY)

Court of Appeals of Kentucky

Nov. 20, 1953.

Certain original papers in matter of deceased's estate disappeared from the Jefferson Circuit Court, Chancery Branch, First Division, after they had been transmitted there on appeal from county court. The Jefferson Circuit Court, Lawrence F. Speckman, J., entered an order, and

appeal therefrom was taken. The Court of Appeals, Cullen, C., held that where Circuit Court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, carbon copies furnished should have shown, in type form, any signatures that were on the originals.

Order reversed with directions.

1. Appeal and Error

Where certain original papers in matter of deceased's estate disappeared from circuit court after papers had been transmitted there on appeal from county court, circuit court and its commissioner, in proceeding to restore lost papers, employed proper procedure in having parties and their attorneys furnish carbon copies of such papers as were in their files, with each side to be given opportunity to examine and compare any copies furnished by the other side.

2. Records

Statutory methods for supplying lost records are not exclusive. KRS 422.200, 422.240.

3. Appeal and Error

Where certain original papers in matter of deceased's estate disappeared from circuit court after papers had been transmitted there on appeal from county court, and circuit court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, parties supplying carbon copies were not required to sign and certify the carbon copies.

4. Appeal and Error

Where certain original papers in matter of deceased's estate disappeared from circuit court after papers had been

transmitted there on appeal from county court, and circuit court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, carbon copies furnished should have shown, in typed form, any signatures that were on the originals.

Walter B. Smith, Louisville, for appellant.

Davis, Boehl, Viser & Marcus, Bullitt, Dawson & Tarrant, Louisville, for appellees.

CULLEN, Commissioner.

The question on this appeal concerns the proper method of restoration of certain original papers in the matter of the estate of John A. O'Brien, deceased, which disappeared from the Jefferson Circuit Court after they had been transmitted to that court on an appeal from the county court. The appellant, Mrs. Smith, has an interest in the estate.

The circuit court directed its commissioner to hold hearings and take evidence for the purpose of "replacing and supplying authentic and certified copies" of the missing papers. The commissioner called in the parties and their attorneys and suggested that they furnish carbon copies of such of the papers as were in their own files, with each side being given the opportunity to examine and compare any copies furnished by the other side. This was done. The administrators and their attorneys supplied 28 copies, and Mrs. Smith and her attorney supplied 13. After examination by both sides, and after some minor corrections, the com-

missioner made a finding that the 41 papers so supplied were true and correct copies of the originals. His report was filed with the court, accompanied by the 41 papers.

Mrs. Smith filed objections and exceptions to the report, on the ground that the administrators and their attorneys should have been required to "sign and certify" the copies furnished by them, and that Mrs. Smith's attorney should have been permitted to "sign and certify" the copies furnished by him and by Mrs. Smith. The court overruled the objections and entered an order which confirmed the report of the commissioner and found that the supplied papers were "true, correct, and authentic copies" of the missing originals.

On this appeal from the order, by Mrs. Smith, the sole contention is that the parties who furnished the copies should have been required to sign and certify them.

[1, 2] We will state at the outset that in our opinion the procedure followed by the court and its commissioner in restoring the missing papers was proper. Although the statutes, KRS 422.200 and 422.240, provide methods for supplying lost records, it has been held that the statutory methods are not exclusive. See Deshong v. Cain, 1 Duv. 309, 62 Ky. 309; Com. v. Keger, 1 Duv. 240, 62 Ky. 240; Bush v. Lisle, 86 Ky. 504, 6 S.W. 330; Moore v. Shepherd, 189 Ky. 593, 225 S.W. 484; May v. May, 150 Ky. 522, 150 S.W. 685.

[3] We are not informed of any reason why the party who supplies a copy of a lost record should be required to sign and certify it, under the method of restoration employed in this case. The finding by the court that the papers are true and correct copies constitutes a sufficient cer-

tification, and no greater validity or effect would be imported to the copies by virtue of their being signed.

[4] However, we think it is essential that the supplied copies be complete to the extent that they show, in typed form, any signatures that were on the originals. For example, if one of the original papers was a signed letter, the copy should have the signature typed upon it, because otherwise it is not a true and correct copy.

The copies supplied in the case before us do not appear in the record on appeal, so we do not know whether they show the necessary signatures. However, from the arguments we gather that they do not. Under these circumstances, it is our opinion that the supplied copies are not completely true and correct.

The order appealed from is reversed, with directions that the court, either directly or through its commissioner, take such further proof as may be necessary to ascertain what signatures appeared upon the original papers, and cause such signatures to be typed upon the supplied copies.

It took until October 1954 to get the joint administrators to restore the records as the court ordered them to do.

510 BEN. MONROE'S REPORTS

SCOTT'S HEIRS vs. KENNEDY'S EX'R., etc.

Error to the Madison County Court.

Settlement of Administrator's Accounts. Notice.

Writs of Error.

CHANCERY. *CASE 98*

JUDGE MARSHALL delivered the Opinion of the Court.

January 15. Case stated.

At the May term, 1849, of the Madison County Court, the commissioners of accounts returned a settlement of the accounts of M. M. Kennedy as administrator of James

Scott, deceased, which was ordered to lie over until the next Court for exceptions. At the June term of the Court, the record states that the settlement having laid over one Court for exceptions, and none having been filed, "was examined and confirmed by the Court and ordered to be recorded." In September, 1851, a writ of error was issued in the name of the heirs and widow of James Scott, against the executrix of M. M. Kennedy, for the reversal of the order confirming the settlement and ordering it to be recorded. Various errors are assigned in the settlement. It is also assigned for error that the plaintiffs in error had no notice of the time and place of making the settlement, which, if the writ of error be sustainable, and if the alleged

fact be true and be a ground of reversal, would preclude the necessity of considering the other errors assigned.

The sixth section of the act of 1834, under which the commissioners have their authority, provides that when the executor or administrator shall apply to have his accounts stated and settled, the commissioners shall cause the heir, devisee or distributee, his or her guardian, if resident in the county, to be summoned to attend the settlement. And it is also provided by the fourth section that the settlement shall lie over for at least one term, for exception, and that if the Court shall approve the report or overrule the exceptions to it, shall be ordered to be recorded, and be deemed *prima facie* evidence of the facts stated in it.

We think it clear that the statute intended to provide a mode of settlement in which the parties interested should in general have an opportunity of questioning and investigating the matters involved, so that the settlement might be the better entitled to the character of *prima facie* evi-

dence. For this purpose the commissioners are directed to give notice, etc., and their report, when made, is to lie over for exceptions. But the fact that notice is dispensed with, if the heir, etc., reside out of the county, shows that the effect of the settlement as evidence does not depend entirely upon the fact of notice. And the direction that the report shall lie over for exceptions for at least one term, is undoubtedly one of the means provided for giving an opportunity of contesting it to those who may be interested in doing so. To parties residing in another county, no other means of knowledge or of contest are secured by the statute, but such as may arise from the notoriety of the proceedings of the County Court, and from the attention with which those who are interested in the management and settlement of estates may be presumed to regard the proceedings upon that subject. A settlement wholly *ex parte* is, of course, entitled to less weight and may be more easily overthrown, than one made upon due notice to all con-

cerned, and which has been subjected to the vigilance of parties opposed in interest. But in the absence of fraud or unfair intention, the want of notice to a resident of the county is no more calculated to detract from the weight of the settlement as evidence, than the want of notice to a non-resident of the county. And although it is certainly the duty of the commissioners to notify the resident party, the statute does not make their power to state and settle and report the accounts depend upon the exact performance of this duty. Suppose, the omission to cause the party to be notified, proceeds from ignorance of the commissioners as to their own duty, or from mere inadvertence, or from ignorance or mistake as to the residence of

the party; undoubtedly the County Court would remedy the omission if apprised of it, but the report might still be acted on, and finally confirmed and recorded; and so it might be, if the Court should proceed in ignorance of the fact that any duty had been omitted, and confirm the report at the second term without notice or appearance.

The commissioners are permanent officers chosen for the purpose of stating and settling the accounts of executors, etc., and sworn to perform their duties. The requisition that they shall cause the heirs, etc., to be notified if resident in the county, is, in our opinion, directory to them, and although a compliance is essential to the correct exercise of their powers, it is not essential to their existence, and although the omission of the notice may affect the credence due to their acts in the particular case, it does not, therefore, make void a settlement regular in other respects, made upon vouchers and other evidence accompanying it to the County Court, and there confirmed, after lying over as directed by law. The statute neither makes an *ex parte* settlement void, nor deprives it of all credence. And being made by sworn commissioners acting for the public and within the scope of their powers, it is under the statute and on general principles, and by common usage

---

The statute directing County Court commissioners to give notice to the parties interested in estates of the time of settlements is but directory to the commissioner, and does not render a settlement made without notice void, notice according to the statute will be presumed, unless disproved.

applicable to such cases entitled *prima facie* to credence, so far as it accords with the evidence on which it professes to be founded, although that evidence may have been received *ex parte*, and with no other scrutiny than that which the commissioners must be presumed to have applied to it.

But although the statute requires the commissioners to cause the heir, etc., to be notified, if resident in the county, it does not require that they should state in their report either that the notice was given, or a reason why it was not given. (The assignment of error alleges as a fact that the plaintiff in error had no notice,) etc. But there is no other evidence of the fact, except in the failure of the commissioners to state in their report that notice was given, or that the heirs did not reside in the county; and before it can be assumed that the commissioners have been guilty of a breach of duty, with respect to giving notice, it must be assumed, from their silence on the subject, not only that they did not give it, but also that the plaintiff in error resided in the county, which is not even alleged. That is, we are to assume from their omission to state what they are not required to state, that they omitted to do what they were expressly required to do. And as there can be no proof upon the subject in this Court, this assumption founded upon the silence of the report, if it be made a ground of reversal, is in effect conclusive, and deprives the executor or administrator of the benefit of the settlement, though it must be admitted that notwithstanding the omission of the commissioners to say any thing on the subject, notice may have been given, or the fact may have existed which dispensed with it, or the parties in interest may in fact have had knowledge of the return of the settlement, or may have been actually in Court. But if there is to be no presumption in favor of the commissioners that they have performed a plain duty, it is to be recollected that they make their report to a tribunal which has general jurisdiction over the subject, and for which they have acted in stating and settling the accounts.

If the omission to say any thing about notice in the report is to be taken here as evidence that there was neither notice nor a proper ground for dispensing with it, we should presume that it is so regarded in the County Court, and that such a report would not be confirmed, unless the Court were satisfied that the requisition of the statute had been complied with, or unless the parties entitled to notice should appear, and the object of the statute be thus accomplished. It should be presumed that if the Court were satisfied that there was no notice when it should have been given, it would either recommit the report or cause the parties interested to be notified of its having been made, and allow them ample opportunity for investigation and exception. If the omission to say any thing on the subject is not regarded in the County Court as evidence that notice has not been given when it should have been, this would tend to prove that such omission is common, and therefore should not authorize the negative presumptions attempted to be deduced from it, and consequently should not authorize a reversal here. The record states that the settlement was examined by the Court; if so, its information tends to show that it was in the usual form, and the inference is that the Court either acted upon the presumption that the commissioners had done their duty with respect to notice, or that it was satisfied of the fact by an oral response from them.

And as the jurisdiction of the Court over the settlement and its confirmation did not depend upon the fact of notice, or of an excuse for not giving it, the failure to state upon its record that either had been proved before it, is not fatal to the proceeding, and does not even furnish ground for the assumption that no such proof was made. Besides, the

Court may, in this case, have known that the heirs did not reside in the county, or may have supposed such to have been the fact; and the contrary is not alleged, and if it were, it could not be proved in this Court. And even if the silence of the report should authorize the assumption that

no notice was in fact given, we do not admit that it authorizes the further assumption that the heirs resided in the county, and were entitled to notice. For, as already said, the power of the commissioners to make and report the settlement, and the power of the Court to act upon it, did not depend upon the fact of notice, or upon the existence of such facts as dispensed with it. And as the commissioner might omit to give notice in a certain state of facts, or rather, as they were required to give it only in a certain state of facts, if it were absolutely certain, or were expressly stated that they did not give it, the presumption should rather be, that the facts which required it did not, than that they did exist.

Notwithstanding these considerations, we are of opinion that the report of the settlement, in all cases, should state either that notice had been given, or the reason why it was not given. But the question here is, whether the order of the County Court ought to be reversed, because the report of the settlement makes no such statement. As a mere error in the form of the report the omission is certainly no ground of reversal, and it is not even assigned as such. And for the reasons already given, we think it should not be regarded in this Court as conclusive proof that notice was improperly withheld, even if that fact should be deemed a ground of reversal.

"But we are of opinion," that the order of the County Court confirming a settlement, without exceptions, in a

case in which it has jurisdiction is not such a final judgment or order as is the proper subject of a writ of error, or of revision and reversal by this Court on any ground. Because, 1. There is in such a case, no judicial contest, and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. 2. There is no final adjudication or determination in favor of one person, or against another, or upon any ques-

---

It is proper that all reports by county commissioners of the settlement of estates should show that notice was given or the reason why it was not.

An order of the County Court confirming the report of commissioners of the settlement of an estate with an administrator or executor is not such a final judgment or order as is the proper subject of a writ of error to the Court of Appeals. It is only prima fac.

tion of property or of personal rights. 3. The settlement

and its confirmation are not conclusive either upon the parties who may have been interested in opposing them, or upon the Court itself, which may order another settlement in which errors in the first may be corrected. 4. They are not conclusive in any other Court, but are only *prima facie* evidence, subject to be surcharged and falsified, and they operate rather as means of preserving evidence, to the preservation of which executors and other fiduciaries are entitled, than as judgments. And being made by sworn officers under the supervision of a Court, they ought to have, and have always had, the effect of *prima facie* evidence, whether made *ex parte* or not.

And, 5. While the application to them by this Court of the ordinary tests to which final judgments are brought for affirmance or reversal, might produce great mischief by subjecting to reversal many fair settlements made upon actual notice, after the fiduciaries and their witnesses are

dead, there is a safe, effectual, and well-known remedy, by bill in chancery, by which such settlements may be not only questioned upon their merits, with full opportunity to each party of adding proof, but the decree of credence to which they are entitled, so far as it depends upon notice or the want of it, may be fairly determined upon allegation and proof. The fact that in the many years during which the system of County Court settlements has been in operation with the effect of making them *prima facie* evidence, there has been, so far as we know, no single instance of a writ of error being sustained or prosecuted for the reversal of any one of them, is strong evidence that such remedy has always been considered as we now consider it, to be inappropriate, and not allowable.

We only add, that if this order were reversed, and there were another settlement in the County Court, the heirs would not thereby obtain final redress, but would probably still have to seek it by a bill in chancery, which is now open to them with the same effect, and with full right of surcharging and falsifying or correcting the settlement, which,

so far as it is erroneous upon its face in point of law, may be done more effectually in a suit in equity than by writ of error, which would probably be followed by such suit, and so far as its errors depend upon matters of fact, or extrinsic evidence can be finally disposed of better in a suit in chancery, than either here or in the County Court.

Judge Ilise does not concur in the foregoing reasoning and conclusions.

Wherefore, by order of a majority of the Court, the writ of error is dismissed.

Burton, for plaintiffs; *Turner*, for defendants.

Case 16—PETITION EQUITY—February 4.

Turley's Administrator v. Barnes, Etc.
Same v. Same.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. SETTLEMENTS OF FIDUCIARIES IN COUNTY COURTS—APPEALS FROM—EQUITY JURISDICTION.—No appeal lies from an order of the county court confirming a settlement with a fiduciary where no formal written exceptions were filed to the settlement, such order not being a final order; and the fiduciary may thereafter bring his equitable action in the circuit court to surcharge and correct the errors in that settlement.

H. B. KINSOLVING FOR APPELLANT.

1. Personal representatives are liable for the management of their trusts as bailees and agents are generally, and must answer, and only answer, for such losses as are occasioned by actual or constructive negligence, or wilful misconduct; in this case the allegations of the petition conclusively negative the existence of any single element of negligence, actual or constructive. Vol. 2, Leading Cases in Equity, 1791; Tuggle v. Gilbert, 1 Duval, 340; Henning v. Jones, 12 Bush, 504; Philadelphia Finance Co. v. The Estate of Law, L. R. A., vol. 14, 103; Faunstock's Appeal, 104 Penn., 46; Commonwealth v. McAllister, 28 Pa., 486; Reese v. Berington, 2 White and T. Leading Cases, 986.

2. Settlements by county courts of the accounts of fiduciaries are only *prima facie*, and may be surcharged in chancery by proper proceedings and purged of all errors where they were not contested in the county court. Scott's Heirs v. Kennedy's Executor, 12 B. M., 516;

Frazier v. Kavanaugh, Administrator, 4 Ky. Law Rep., 712; Bell v. Henshaw's Executor, 91 Ky., 430.

3. But this is not an action to surcharge the settlement, but an equitable action by the administrator against all of the heirs seeking equitable relief against all of them, according to their respective interests, from a *prima facie* liability against him raised by the settlements charging him with admitted assets, but all of which had, before he was allowed by the county court to make his settlement, been placed beyond his control without fault upon his part.

W. H. HOLT ON SAME SIDE.

1. A personal representative is not liable for the money lost which he had deposited in bank where he acts in good faith and the bank was in good repute. 7 Am. & Eng. Enc. of Law 350, and authorities there cited.

2. The settlement in the county court was only *prima facie* and added nothing to the liability of appellant for the funds lost without his neglect; it was not a judgment and did not fix his liability, and he could not have appealed therefrom, and therefore such settlement may be surcharged in chancery. Scott's Heirs v. Kennedy's Executor, 12 B. M., 415; 4 Ky. Law Rep., 712; Bell v. Henshaw's Executor, 91 Ky., 430; Brady v. Cooper, 12 Ky. Law Rep., 420.

TYLER & APPERSON FOR APPELLEE.

1. It is alleged in the petitions that appellant in his fiducial capacity made the settlements in the county court in which he was, without his consent and over his protest, charged with the money deposited in the New

Farmers Bank, which shows that he not only appeared in the county court but contested the very questions which he is now attempting to make in these actions; having contested the matter in the county court, and it there having been decided against him, his remedy was by appeal. Bell v. Henshaw's Executor, 12 Ky. Law Rep., 675.

2. An injunction to prevent the multiplicity of suits is allowed only when the subject matter of the various litigations, as well as the parties thereto are substantially the same; the pendency of other actions by various persons against a defendant for the same subject matter, affords no ground for such injunctions. High on Injunctions, sec. 65.

Vol. 103] JANUARY TERM, 1898. 129

Turley's Admr. v. Barnes, Etc.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

The parties to the records in these two cases being the same, the petitions being the same except as to the amount in controversy, and the two cases having been heard together and each having been dismissed on special demurrer to the jurisdiction of the court, and the legal question involved being the same in both cases, we will consider them together.

The petition alleges that while appellant was acting as administrator of Mahala Turley and as administrator, with the will annexed, of James Turley, deceased, he made a settlement of his accounts as administrator of each with the county judge of Montgomery county in 1894, in which settlements the county judge, "without his consent and over his protest," charged him in the case of Mahala Turley with the sum of $588.35, and in the case of James Turley with the sum of $2,094.28, which were deposited to his credit as

administrator in the New Farmers' Bank of Mt. Sterling, at the date of the assignment of the bank on the 26th day of July, 1893. The petition further alleges that the bank is insolvent and that it had paid 40 per cent. to its depositors and would probably pay not more than 55 per cent. in all, making a loss of 45 per cent. of such deposit in each case; that at the time he made these deposits in the bank for safe keeping it was in good repute and regarded as a safe institution; that he believed it to be perfectly solvent and acted in good faith and for what he regarded as the best interest of the heirs at the time the deposits were made. And this suit was brought to falsify and surcharge the county court

settlement, and asks that it be corrected by allowing him credit for actual loss upon the deposits so made by him, and for a restraining order enjoining the heirs at law from prosecuting suits to recover the balance due them on these items of alleged indebtedness, as shown by the county court settlement, until the case could be heard.

The defendants demurred to the petition on the special ground that the court had no jurisdiction of the subject matter of the action, and the court sustained the demurrer and entered a judgment dissolving the injunction and dismissing the petition; and we are asked upon this appeal to reverse that judgment.

It is urged by appellee that the settlement made in the county court by appellant is *prima facie* correct and enforcible, and that as it appears from the allegations of the petition that he made the settlements complained of in person and was charged, "without his consent and over his protest," with the whole amount of these deposits, that appellant had to litigate these items before the county court and that his remedy for alleged errors in the settlement com-

plained of is by appeal to the circuit court, under the provisions of section 978 of the Kentucky Statutes, which provides:

"Appeals may be taken to the circuit court from all judgments and orders of the county court in the settlement of accounts of personal representatives, assignees, guardians, trustees, curators, and other fiduciaries," and that having failed to prosecute the appeal as pointed out by the statute, he is estopped from maintaining this action to surcharge and falsify the settlements complained of.

By the provisions of article 5, chapter 35, Kentucky Stat-

utes, the county judge is authorized to make settlements with personal representatives, and he is directed to make a report, in writing, of such settlement showing each item of debit and credit and the general result of all the evidence heard and vouchers filed to the county court at its next regular term and noted of record, and section 1067 provides that this report shall lay over one term for exceptions to be filed by any person interested; that if no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded; that if exceptions are taken, other evidence besides that reported may be heard, and the court shall, upon the whole case reject, alter or confirm the report, and if confirmed order it to be recorded; that any new evidence given in court must be reduced to writing and filed with the report; and that settlements so made shall be *prima facie* evidence between the parties.

In passing upon the question as to whether an order of a county court confirming a settlement, where no exceptions had been filed, was such a final judgment or order as to be the proper subject of revision and reversal by this court

on any ground, this court, in the case of Scott's Heirs v. Kennedy's Executor, 12 B. M., 515, said:

"There is in such a case no judicial contest and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. Second. There is no final adjudication or determination in favor of one person or against another or upon any question of property or personal rights. Third. The settlement and its confirmation are not conclusive, either upon the parties who may have been interested in opposing it or upon the

court itself, which may order another settlement, in which errors in the first may be corrected. Fourth. It is not conclusive in any other court, but is only *prima facie* evidence, subject to be surcharged and falsified, and may operate rather as a means of preserving evidence, and the preservation of which executors or other fiduciaries are entitled, than as a judgment; and being made by officers under the supervision of the court, it ought to have, and has always had, the effect of *prima facie* evidence, but can always be questioned upon its merits by a bill in chancery."

And in the case of Stanbury's Admr. v. Robinson, 16 Ky. Law Rep., 310, this court again reviewed this question, referring to the case, *supra*, and held that the order approving the report of settlement made by the county judge and ordering it to be recorded, was not a final order.

In the case at bar, no formal written exceptions were filed to the report made by the judge to the county court of his settlement with appellant, nor was there any contest made in that court as to the validity of the charges complained of, or any judgment rendered passing upon the rights of the parties with reference thereto. And, while we think it clear

that if a party in interest shall file written exceptions to a settlement made by a fiduciary, and these exceptions are regularly tried by the county court upon their merits and a judgment entered sustaining or overruling them, the proper remedy to a party who feels aggrieved is by appeal as provided in section 978, yet we do not think that the effect of that statute is to take away from parties who do not file such exceptions or in any way contest in the county court the validity of charges complained of, the right to have

such alleged errors reviewed, by a bill in chancery. Nor is there anything in the opinion in the case of Bell v. Henshaw's Executors, 12 Ky. Law Rep., 674, which is in conflict with this view. In that case the court says that a devisee or party in interest can not contest a settlement by a fiduciary in both the county and circuit courts, and that when he tests its validity in the county court his remedy is by appeal.

The fact that at the date of the settlement appellant verbally objected to being charged with the full amount of money on hand to his credit in the bank at the time of its failure, was not equivalent to the filing of formal written exceptions to those charges, and the question of his liability for these items was not litigated in the county court. The mere formal entry of the order of confirmation of the settlement, no exceptions having been filed thereto, was not a final judgment conclusive of the rights of the parties from which appeal could be taken, and which precludes appellant from bringing his suit to surcharge and correct the alleged errors in the settlement and to restrain the prosecution of suits for the collection of the balances found to be due by the heirs growing out of such errors.

The judgment is therefore reversed and cause remanded for proceedings consistent herewith.

16 Ky. Law Report

STANBERRY'S ADM'R v. ROBINSON, &c.

(Filed October 18, 1894—Not to be reported.)

1. Administrator—Excessive commission allowed—This court will not disturb the finding of a court of chancery which, upon appeal, reduced the commission of 5 per cent. on $240,000, the amount disbursed, allowed by the county court to the administrator of the decedent's estate, as the allowance of the county court was flagrantly excessive by reason of the fact that the administrator came into possession of the estate without trouble or litigation; that he turned over to the heirs the stocks, bonds, etc., of the decedent in bulk and in kind; that his attorney, to whom an allowance was made, prepared all necessary releases, and the whole transaction was of the simplest character.

2. Same—Allowance for services as agent of decedent—The administrator was not entitled to compensation for services rendered decedent as her agent in collecting her

16 Ky. Law Report.

rents, interest, etc., as she had paid him for those services before her death and died believing that he was satisfied and had no further claim.

3. Appeals—Time of appeals to circuit courts—A partial settlement having been made by the administrator, and the final settlement some months later, at which exceptions were filed by the heirs of the decedent and passed upon by the county court, an appeal taken to the circuit court sixty days from the final settlements is in compliance with the requirements of the statute regulating appeals in such cases. No exceptions were filed at the first settlement,

which was a partial one. The administrator still had in his hands funds for the future disposition of the court, and the county court still retained control of the question of allowance to the administrator or of any other matter embraced in the settlement. At the first settlement the order approving the report of the county judges and ordering it to be recorded was not a final order.

4. Same—Circuit courts—In the statute providing for appeals to the circuit court in cases of this kind "the words 'circuit courts' shall be construed to mean any court of similar jurisdiction, either criminal, ordinary or equitable."

W. H. Mackoy, for appellant.

Root & Root for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Hazelrigg.

Mrs. Cecilia B. Stanberry died intestate in April, 1889, the owner of a large personal estate, and on May 13th following Geo. W. Neff was appointed by and qualified before the Campbell County Court as her administrator.

The estate was singularly free from complications, and on June 24, 1889, the administrator turned over in bonds, stocks, etc., to the heirs of the decedent more than $210,000, for which he took their joint receipt.

In a partial settlement made in the Campbell County Court on August 1, 1889, the total amount of disbursements was $213,924.28, and on this sum that court allowed the administrator 5 per cent. or $10,696.21 as his commission.

In June, 1891, a second and final settlement was made, and on the additional amount found to have been distributed, viz., $28,349.65, the county court allowed the administrator the same percentage, or $1,371.25, making the total amount allowed him as compensation the sum of $12,067.46. The county judge also allowed him the sum of $3,000 for services as agent for the decedent in collecting her rents, interest, etc., for a period of some eight years immediately preceding her death.

The first settlement was ex parte, but at the final settlement the heirs of Mrs. Stanberry appeared and filed a number of exceptions, none of which, however, need be noticed here, save those going to the amount of the allowance to the administrator and the charge for services as agent. These exceptions were overruled by the county court, but on appeal to the Campbell Chancery Court the heirs the allowance to Neff as administrator was reduced by $6,000, and his demand as agent was rejected altogether. From that judgment Neff appealed to this court, where the appeal is being prosecuted by his administrator, he having since died.

It is insisted that the allowance of 5 percentum upon the amount received and distributed was reasonable and should not have been disturbed; that the chancery court

had no jurisdiction of the appeal because more than sixty days elapsed from the time of confirming the settlement allowing the commission complained of in the county court until the appeal was taken to the chancery court, and because the statute provides for appeals in cases of this kind to circuit courts only, and not to chancery courts; that the claim of $3,000 was reasonable and should have been allowed.

On the question of the administrator's compensation we are not disposed to disturb the finding of the lower court. He came into the possession of the entire estate without trouble or litigation. He turned over to the parties ready to receive them the stocks, bonds, etc., of the decedent in bulk and in kind. His attorney, to whom an allowance of $1,000 was made, prepared the necessary releases, and the whole transaction was of the simplest character. The

promptness of the administrator is to be commended, but it is not thought that he earned more than the sum given him by the chancery court. It seems to us that the allowance by the county court was flagrantly excessive.

We do not think that the limitation of sixty days, within which an appeal may be prosecuted from the orders and judgments of county courts to circuit courts, is applicable to cases like the one under consideration.

The judge of the county court is given authority to settle the accounts of fiduciaries when called on for that purpose. His "report in writing shall be returned to the county court at its next regular term and noted of record. The report shall show the result, giving items of debit and credit, and he shall return therewith all vouchers and evidence adduced before him on the settlement." The clerk shall "indorse on the report the time of filing the same, and it shall lay over one term for exceptions to be filed by any person interested." "If no exceptions are filed by or at the succeeding term of the court, the report shall, if approved, be recorded." If the exceptions are taken the court shall, upon evidence heard on the whole case, "reject, confirm, alter or amend the report, and, if confirmed, order it to be recorded." "Settlements so made and recorded shall be *prima facie* evidence between the parties." (Subsections 1 to 10 inclusive, section 2, article 14, chapter 28, General Statutes.)

In this case there were no exceptions filed to the first settlement, which, as we have seen, was only a partial one. The administrator still retained in his hands some $40,000 for the future disposition of the court. We are of opinion that the county court still retained control of the question of allowance to the administrator, or of any other matter embraced in the settlement. The order approving the report of the county judge and ordering it to be recorded was

not a final order. As said by this court in a case precisely similar to this:

1st. "There is in such a case no judicial contest and no judicial decision, but the order of confirmation" (approval in our present statute) "partakes rather of the character of a ministerial than of a judicial act.

2d. "There is no final adjudication or determination in favor of one person or against another, or upon any question of property or of personal rights.

3d. "The settlement and its confirmation are not conclusive either upon the parties who may have been interested in opposing them or upon the court itself, which may order another settlement in which errors in the first may be corrected." (Scott's heirs v. Kennedy's ex'or, 12 B. M. 510.)

Within sixty days from the judgment of the Campbell County Court, passing on the exceptions of the heirs to the

final settlement of the accounts of the administrator of Mrs. Stanberry, an appeal was taken to the Campbell Chancery Court, and this, we think, was in compliance with the requirements of the statutes. That such an appeal might go to the chancery as well as to the circuit court appears clear.

"The words 'circuit courts' shall be construed to mean any court of similar jurisdiction, either criminal, ordinary or equitable." (Section 28, chapter 21, General Statutes; see also section 14, title 17, Civil Code.)

Of the demand of Neff as agent the chancellor said: "The appellee (Neff) was a friend of Mrs. Stanberry. She was his friend. She received a large estate upon the death of her husband in 1881. The appellee did assist her in the management of her business. It was not complicated or

difficult. She paid him $50 for every month during the eight years in which she enjoyed the estate for his services. She did not agree to pay more, nor did he signify that he desired greater compensation. She died in the belief that he was satisfied and had no further claim. It did not occur to him to suggest this claim in August, 1889. He had received $4,800 in the lifetime of the intestate for these services. It did not occur to him to assert the claim until 1891. He might have been entitled to more than $600 per year upon a quantum meruit, if he had not allowed her to believe that she was paying him all that he claimed."

We approve these conclusions. The motion of the administrator de bonis non of Mrs. Stanberry to be made a party appellee here is overruled. The balance in the hands of the former administrator is not an unadministered asset.

Judgment affirmed.